IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 822 OF 2000

VIJAY VASUDEO MADGAONKAR)
Convict Prisoner No. Cl 11372)
Yerwada Central Prison, PUNE)
411 006) .. APPELLANT

Versus

THE STATE OF MAHARASHTRA) .. RESPONDENT

Ms. Sharmila Kaushik, appointed for final hearing as per court's order.

Mr. K. V. Saste, APP

CORAM:-SMT. RANJANA DESAI &

D.G. KARNIK, JJ.

DATED ON WHICH THE JUDGMENT RESERVED:18/3/2006

DATE ON WHICH THE JUDGMENT DELIVERED:23/3/2006

JUDGMENT: (Per Smt. Ranjana Desai, J.)

. The appellant has challenged in this appeal judgment and order dated 4/5/2000 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 47 of 1998. By the impugned order he was convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer R.I. for life and to pay a

fine of Rs.500/-, in default to suffer further R.I. for one month. For the sake of convenience we shall refer to the appellant as "the accused".

2. The accused was married to deceased Geeta the daughter of PW 1 Ladki Rathod. The deceased was residing with the accused at Bhiku Manchubhai Chawl, room No. 18 at the back of Bhagwati Chawl Malad (W). The accused was not doing any work. The deceased used to work and run the house. The accused used to demand money from the deceased for liquor as he was addicted to liquor. The deceased used to complain about the behaviour of the accused to her mother PW 1 Ladki.

3. According to PW 1 Ladki on 28/9/97 she received a telephonic message from her elder son-in-law that she should immediately go to the house of the deceased as the accused had killed her. She then went to the house of the accused along with her daughter Reva. After she reached the house of the deceased she saw the deceased lying in a pool of blood and the accused was sitting on the wooden cot. One knife was lying near the deceased. The deceased had received injuries on her left side neck. PW 1 Ladki asked the accused as to who had

assaulted the deceased on which he told her that he had assaulted the deceased with a knife. The police recorded her complaint on 28/9/97 which is at Exhibit-6.

4. On the basis of this complaint which was treated as F.I.R., the investigation was started. The accused came to be arrested. Postmortem was done on the deceased by PW 6 Dr. Sanap The cause of death was given by Dr. Sanap as Haemorrhage and shock due to stab injury. Inquest-cum-seizure-cum-spot panchnama Exh.-20 was drawn and knife Article 1 as well as clothes of the deceased Article 2 (colly) and the clothes of the accused Article 3 (colly) were taken charge of. After completion of the investigation the accused came to be charged as aforesaid.

5. The prosecution examined as many as nine witnesses. The prosecution examined PW 1 Ladki Rathod, mother of the deceased and PW 4 Champa Rathod, the sister of the deceased. The prosecution also examined PW 2 Nalin Shah, the employer of the deceased and PW 3 Rajani who was working with the deceased in the factory of PW 2 Nalin Shah. PW 7 Vijay Khade was examined to prove

spot-cum-inquest-cum-seizure panchnama Exh.-20 as she had acted as pancha to the said panchnama. PW 8 Ashok Wanjale PSI attached to Malad Police Station and PW 9 API Laxman Farande, who was also attached to Malad Police Station were examined to give details of investigation. PW 6 Dr. Rambhau Sanap had done postmortem on the deceased. He has proved the postmortem notes Exh.-16.

6. The accused claimed to be innocent. He denied the prosecution case. According to him he was falsely implicated in the case by the police. The evidence adduced by the prosecution found favour with the learned Sessions Judge. He convicted the accused as aforesaid and hence this appeal.

7. We have heard at some length Ms. Sharmila Kaushik, learned counsel appointed to argue the case on behalf of the accused and the learned APP Shri Saste. With the assistance of the learned counsel, we have gone through the evidence and the record of the case.

8. Ms. Kaushik contended that the prosecution has not examined any eye witnesses. The case rests on circumstantial evidence. She submitted that there

are no clinching circumstances indicating the guilt of the accused. She further submitted that the chain of circumstances is not complete and does not point unerringly to the guilt of the accused. According to the learned counsel the prosecution has relied on extra judicial confession made to the mother of the deceased. The learned counsel submitted that the evidence of extra judicial confession is a weak type of evidence and unless corroborated cannot be relied upon. According to the learned counsel inasmuch as there is no corroboration to the extra judicial confession, the conviction and sentence imposed on the accused on the basis of the same must be set aside.

9. Ms Kaushik submitted that in any event the accused has given a single blow on the neck of the deceased. He has used a kitchen knife and, therefore, intention to murder the deceased cannot be attributed to him. She submitted that, therefore, if this court comes to the conclusion that the accused has dealt the fatal blow to the deceased the accused could at the most be convicted under Section 304 Part II of the Indian Penal Code and not under Section 302 as has been done by the learned Sessions Judge.

10. The learned APP Shri Saste on the other hand submitted that cogent and clinching evidence has been adduced by the prosecution. PW 1 Ladki the mother of the deceased has no reason to falsely involve the accused. The accused was found sitting near the dead body of the deceased. Being the husband of the deceased it was for the accused to give explanation as to how the deceased had received such serious injury on her neck in the matrimonial home. No explanation is offered by the accused. The accused has admitted his guilt and his involvement is indicated by the fact that the accused was present in the house and a bloodstained knife was found in the house. The clothes of the accused were seized and the Chemical Analyser's report indicates that human blood was found on his clothes. The learned counsel submitted that, therefore, the learned Sessions Judge has rightly convicted the accused and this court should not interfere with the impugned judgment and order.

11. We have given anxious consideration to the submissions advanced by the learned counsel. The evidence led by the prosecution clearly establishes that the accused was not doing any work. The

deceased was working with PW 2 Nalin Shah. She was maintaining the house. The accused was addicted to liquor and he used to demand money from the deceased.

12. PW 1 Ladki has stated that the deceased was not leading a happy life with the accused. The deceased used to work. The accused was not doing any work. He used to stay at home and demand money from the deceased for drinks. The deceased used to complain to her that accused used to beat her. PW 4 Champa has also stated that the deceased used to work in a hair pin company at Malad. The accused was jobless. She has stated that the deceased used to tell her that the accused used to demand money from her and he used to beat her if she refused money. The prosecution has also examined PW 2 Nalin Shah, the employer of the deceased. Nalin Shah has stated that he is running a business of manufacturing hair pins at Bombay Talkies Compound Malad (W). He has stated that the deceased used to work in his factory. According to him the accused used to come to his factory to see the deceased and sometimes used to demand money from her. On some occasions when the accused used to demand money from the deceased, the deceased used to take money

from him and give it to the accused.

13. PW 5 Onil Domnic Rodrigues is the husband of sister of the deceased. He has also stated that there used to be frequent quarrels between the accused and the deceased as they did not have any issue. The accused used to demand money from the deceased for liquor and on her refusal the accused used to beat the deceased. The evidence of these witnesses establishes that the accused was addicted to drinks. He used to quarrel with the deceased and used to demand money from her and if the deceased refused to give the money he used to beat her. On this aspect all the witnesses are consistent.

14. PW 1 Ladki further stated that on 28/9/97 after receiving a telephonic message from her elder son-in-law she went to the house of the deceased. She saw the deceased lying in a pool of blood in her house and the accused sitting on a wooden cot. A knife was lying near the the deceased. When the knife Article No. 1 was shown to her she identified it as the same knife which was lying in the house of the deceased. She has further stated that when she asked the accused as to who had

assaulted the deceased, he told her that he had assaulted the deceased with the knife. It appears that PW 8 Ashok Wanjale PSI attached to Malad Police Station had received an anonymous phone as regards the incident in question. After making relevant station diary entry, he came to the spot. PW 1 Ladki was in the house of the deceased. He recorded her complaint which was treated as F.I.R. It is at Exhibit-6. PW 1 Ladki was cross-examained. However, she has stood firm in her cross-examination. Nothing has been elicited in her cross-examination which can persuade us to hold that she is an unreliable witness. We find this witness to be a very reliable witness. There is no reason for her to falsely implicate the deceased. Therefore, it must be concluded from the evidence of this witness that the accused made an extra judicial confession to her that he had killed the deceased with a knife.

15. PW 2 Nalin Shah the employer of the deceased has stated that after getting to know about the incident he had gone to the house of the deceased. He found the deceased lying in a pool of blood. The accused was sitting on the cot in the same room. PW 3 Rajani who was working with the

deceased in the factory of PW 2 Nalin Shah, was declared hostile by the prosecution. She was cross-examined. It is well settled that it is not necessary to discard the evidence of a hostile witness in its entirety. That part of Rajani's evidence which is consistent with the prosecution case and is not shattered by cross-examination can always be made use of by the prosecution.

16. It is pertinent to note that in her cross-examination she has stated that when she asked the accused about the incident he told her that the day before the incident a quarrel had taken place between him and the deceased on account of money demanded by him for liquor and, therefore, out of anger he had assaulted the deceased on the neck with the knife which was used to cut vegetables and due to that assault the deceased had died. Rajani has again repeated that she used to go to the factory along with the deceased and that on the day of the incident she went to the house of the accused and after he opened the door she asked him as to how the incident has happened on which the accused told her that he was under the influence of liquor, and as the deceased did not give money to him he assaulted her.

17. PW 5 Onil Rodrigues has stated that he went to the house of the accused after coming to know about the incident. He found the deceased lying in a pool of blood. There was injury on the left side of her neck and one knife was lying near her. The accused was sitting on a wooden cot. He heard the accused telling the police that he had assaulted the deceased with knife because she did not give him money for liquor. The defence has not been able to make any dent in the evidence of this witness in the cross-examination. Therefore, evidence of PW 1 Ladki PW 3 Rajani and PW 5 Onil establishes that the accused had made extra judicial confession that there was a quarrel between him and the deceased; that the deceased did not give money for liquor and, therefore, he assaulted her with a knife.

18. It was argued that extra judicial confession is a weak type of evidence and corroboration is necessary for the same. In our opinion, in the present case ample corroboration is found in the other evidence on record. PW 1 Ladki, PW 2 Nalin Shah, PW 3 Rajani and PW 5 Onil have stated that on 20/9/97 at about 9 a.m. when they reached the

house of the accused the deceased was found lying in a pool of blood, that there was injury on her neck, that the accused was sitting on a cot near her and that bloodstained knife was found lying near the deceased. There was no one else in the house except the deceased and the accused.

19. Article 1 knife was seized under panchnama Exhibit-20. Under the same panchnama the clothes of the deceased and the clothes of the accused were also taken charge of. PW 7 Vijay Khade is a pancha who has proved panchnama Exhibit-20. Her evidence is supported by evidence of PW 8 Ashok Wanjale who had drawn panchnama Exhibit-20. Therefore, seizure of the knife, clothes of the accused and the clothes of the deceased is proved. PW 9 PSI Laxman Farande has stated that all the articles were sent to the Chemical Analyser. Chemical Analyser's report is at Exhibit-26. Though blood group found on these articles could not be identified the Chemical Analyser's report states that these articles were stained with human blood. The fact that the knife had human blood and the clothes of the accused were also having human blood, are clinching circumstances indicating the involvement of the accused in the crime. It is not the case of

the accused that there were any injuries on him or he was attacked by anybody. Therefore, finding of human blood on his clothes is an incriminating circumstance. We have already noted that the relations between the accused and the deceased were far from happy. The deceased used to demand money for liquor and on her refusal to give money, the deceased used to beat her. Extra judicial confession made by the accused is, therefore, supported by the other evidence on record. We, therefore, find no hesitation in coming to the conclusion that it is the accused who dealt the fatal blow to the deceased.

20. The question now is what offence is committed by the accused. According to Mrs. Kaushik, learned counsel for the accused, the offence may be under Section 304 Part I or Part II of the I.P.C. because there was no premeditation and the blow was dealt on a spur of moment with a kitchen knife. We will examine this submission.

21. PW 6 Dr. Sanap had done postmortem on the deceased. Dr. Sanap found the following external injuries on the deceased.

External Injuries:

1. Incised stab wound over left side of neck 2cm. above the clavical oblique in direction of size 1cm.x 1/2 cm. cavity deep. On dissection of the wound referred above, left lung upper lobe out through and through of length 1 cm. x 1/2 cm.-aorta cut on one side about .8 cm. x .2 cm. - Haematoma in strap muscles present.

22. According to Dr. Sanap the death was caused due to haemorrhage shock and due to stab injury and the external injury could be possible by sharp edged weapon such as knife, Article 1. We have seen the knife Article 1. It is a small kitchen knife. In the F.I.R. PW 1 has stated that the accused told her that on the previous night there was a quarrel between him and the deceased and out of anger he picked up the knife used for cutting vegetables and gave a blow with it on the neck of the deceased. PW 3 Rajani has also said that the accused told her that a day before he had a quarrel

with the deceased on account of money demanded by him for liquor and, therefore, out of anger he had assaulted the deceased with a knife used for cutting vegetables.

23. PW 5 Onil has also said that he had heard the accused telling the police that he had assaulted the deceased with knife because she did not give the money for liquor. All these witnesses have also stated that there used to be quarrels between the two and the accused used to demand money for liquor. It appears to us, therefore, that in this case there was no premeditation or planning. There was a quarrel between the accused and the deceased. The accused wanted money for liquor which the deceased refused to give and, therefore, in a heat of passion the accused who was enraged, took the kitchen knife which was lying there and stabbed the deceased with it on her neck. The blow was not inflicted on the chest or the head. The postmortem notes describe the incise stab wound as admeasuring 1 cm. x 1/2 cm. cavity. Though the injury was a grievous injury, the circumstances under which it was caused and the weapon used indicate that there was no intention to kill the deceased. It is pertinent to note that the accused did not abscond.

He continued to remain in the room.

24. In **Laxman Kalu Nikalje v. The State of Maharashtra, AIR 1968 Supreme Court 1390**, the Supreme Court observed that a single injury was inflicted on the deceased and though the injury was serious in that it had cut auxiliary artery and veins, it was not on the vital part of the chest and had not reached the lungs. The incident itself took place, presumably, as a result of a quarrel over the subject as to when the accused could take his wife back home. The High Court had convicted the accused under Section 302 of the I.P.C. The question was whether the offence can be said to be covered by thirdly of Section 300 of the I.P.C. The Supreme Court observed that this section requires that the bodily injury must be intended and the bodily injury intended to be caused must be sufficient in the ordinary course of nature to cause death. It was observed that this clause is in two parts; the first part is a subjective one which indicates that the injury must be an intentional one and not the accidental one, the second part is objective in that looking at the injury intended to be caused, the court must be satisfied that it was sufficient in the ordinary

course of nature to cause death. The Supreme Court held that in the facts before it the first part was complied with because the injury which was intended to be caused was the one which was found on the deceased. But the second part was not fulfilled because but for the fact that the injury caused the severing of artery, death might not have ensued. It was observed that the injury which the accused intended to cause did not include the cutting of the artery but to wound the deceased and, therefore, clause thirdly of Section 300 did not cover the case. The Supreme Court held that the first and second part of Section 299 which define culpable homicide did not apply because the accused did not intend causing death and did not intend causing such bodily injury as is likely to cause death. The Supreme Court held that the act which was done was done with the knowledge that the accused was likely by such act to cause the death and, therefore, the case fell within the third part of Section 299 and will be punishable under the second part of Section 304 of the Indian Penal Code as culpable homicide not amounting to murder.

25. In our opinion, support can be drawn from the judgment of the Supreme Court in **Laxman Nikalje's**

case (supra). The accused was addicted to drinks. There was a quarrel between him and the deceased. He wanted money for liquor which the deceased refused to give. Therefore, in a fit of anger without premeditation he gave a blow with a kitchen knife on the neck of the deceased. He did not run away after the assault. It is true that the injury is serious in that it cut left lung upper lobe and arota. But the incised stab wound admeasured 1cm. x 1/2 cm cavity deep. If it had not cut the left lung upper lobe and arota death might not have ensued. The quarrel which preceeded the attack, the use of kitchen knife and other attendant circumstances indicate that there was absence of intention to murder. The act was done with the knowledge that by doing that the accused was likely to cause death and, therefore, third part of Section 299 of the Indian Penal Code would be attracted. The offence would be culpable homicide. But since it was committed without premeditation, in the heat of passion upon a sudden quarrel. Exception 4 of Section 300 would be attracted. The accused is thus guilty of culpable homicide not amounting to murder punishable under Section 304 of the Indian Penal Code. Since in our opinion, the act is done with the knowledge that it is likely to

cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death it would be covered by Section 304 Part II of the Indian Penal Code. Hence the impugned judgment and order to the extent to which it convicts the accused under Section 302 of the Indian Penal Code and sentences him to life imprisonment must be set aside and instead the accused will have to be convicted under Section 304 Part II of the Indian Penal Code and sentenced to suffer R.I. for ten years. The sentence of fine will have to be confirmed. Hence the following order:

. "The conviction of the accused Vijay Vasudeo Madgaonkar under Section 302 of the I.P.C. and sentence of life imprisonment imposed on him under the impugned judgment and order dated 4/5/2000 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 47 of 1998 is quashed and set aside. Instead the accused is convicted under Section 304 Part II of the I.P.C. and sentenced to suffer R.I. for 10 years. The sentence of fine is maintained. The accused shall pay fine of Rs.500/-. In default to suffer further R.I. for one month.

. Needless to say that the accused will be entitled to set off for the period of imprisonment which he has already undergone.

. With the above modification of the impugned order, the appeal is disposed of.

(SMT. RANJANA DESAI, J.)

(D. G. KARNIK, J.)

FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.822 OF 2000

Office notes, office Memoranda of Coram, appearances, Court's orders or directions & Registrar's orders.	Court's or Judge's Orders

Ms. Sharmila Kaushik appointed advocate for appellant-accused

Mr. K.V. Saste, APP for the appellant-State.

CORAM: SMT. RANJANA DESAI & D.G. KARNIK, JJ.

DATE:23/3/2006

P.C.:-

For the reasons recorded separately in the Judgement, this court has passed the following order:

"The conviction of the accused Vijay Vasudeo Madgaonkar under Section 302 of the I.P.C. imposed on him under the impugned judgment and order dated 4/5/2000 passed by the

Additional Sessions Judge, Greater Bombay in Sessions Case No. 47 of 1998 is quashed and set aside. Instead the accused is convicted under Section 304 Part II of the I.P.C. and sentenced to suffer R.I. for 10 years. The sentence of fine is maintained. The accused shall pay fine of Rs.500/-. In default to suffer further R.I. for one month.

Needless to say that the accused will be entitled to set off for the period of imprisonment which he has already undergone.

With the above modification of the impugned order, the appeal is disposed of.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)